United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22155

OTIS SOLOMON, Appellant

v.

UNITED STATES OF AMERICA, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN A. TERRY
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(Appointed by this Court)

935 Washington Building
Washington, D.C. 20005

(Crim. No. 1457-67)

ISSUES PRESENTED

1. Was appellant's identification by two witnesses, including the complainant, shortly after his arrest violative of his constitutional right to counsel and contrary to due process of law?

2. If so, should not the testimony of those two witnesses at trial identifying appellant as one of the perpetrators of the offense have been excluded?

This case has not previously been before this Court.

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*Cases chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS
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No. 22155

OTIS SOLOMON, Appellant

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UNITED STATES OF AMERICA, Appellee

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

John Lewis and Otis Solomon were both charged with robbery and assault with a dangerous weapon, the weapon being a shod foot, in a two-count indictment filed November 20, 1967. They went to trial on the indictment in the District Court before Judge Smith and a jury on March 25 and 26, 1968, and were found guilty, Lewis on one count, Solomon on both. By judgment and commitment filed June 26, 1968, Solomon was sentenced to be imprisoned for two to six years on each count, the sentences to run concurrently. Leave to appeal in forma pauperis was granted by the trial court.[1]

1/ Lewis was given three years' probation and did not appeal

The evidence at trial showed that the complaining witness, Willie L. Simms, was beaten up and robbed by a group of about half a dozen boys and young men on the evening of October 9, 1967. Mr. Simms testified that he was walking on Minnesota Avenue, S.E., on his way home from a job on Nichols Avenue[2/] when someone grabbed him from behind and ordered him to hand over his money. When Mr. Simms resisted he was knocked to the ground, beaten and kicked by several persons---an indeterminate number, but "more than two or three" (Tr. 26; see Tr. 38-39). Only two of the group participated in the kicking (Tr. 27), but Mr. Simms could not see either of them (Tr. 34). He was specifically unable to identify appellant Solomon as one of the kickers (Tr. 45). Mr. Simms shortly lost consciousness, and when he awoke he found himself lying on the ground. His wallet and key case were missing from his pocket (Tr. 26, 30-31). Police were present, and a crowd had gathered (Tr. 43). Mr. Simms was subsequently taken to No. 11 Precinct. There he was confronted with three individuals, two of whom he identified as his assailants (Tr. 46-47). These two were Lewis and appellant Solomon, whom he also identified in court (Tr. 32).

2/ Mr. Simms, a self-employed roofer, was walking north toward Pennsylvania Avenue to catch a bus for home (Tr. 25, 36-37).

Miss Vicky Abney was also walking along Minnesota Avenue that evening when she observed Mr. Simms, evidently intoxicated,[3] leaning against a fence (Tr. 32, 31-32). According to her testimony, a group of six teen-agers came running out of a nearby park and accosted Mr. Simms. Appellant Solomon, who Miss Abney testified was one of the group, asked Mr. Simms if he had any money. Mr. Simms made a reply which she could not hear,[4] and Solomon said, "Oh, yes, you do" (Tr. 53). Solomon then directed one of the others in the group, whom Miss Abney identified as the co-defendant Lewis, to go through Simms' pockets. Lewis did so and handed the contents of the pockets to Solomon, who said to Simms, "You have more money than that," and hit him, knocking him down (Tr. 54-55). Others in the group, including Lewis, struck and kicked Mr. Simms after he was on the ground (Tr. 54-55, 65). Miss Abney went into a nearby house and telephoned for the police, who arrived while Mr. Simms was still on the ground being beaten. As the police approached, the assailants ran off through the park.

3/ Mr. Simms had earlier denied that he had taken anything at all to drink that day (Tr. 37-38).

4/ At this point Miss Abney was only three to five feet away from Mr. Simms (Tr. 33). Although it was shortly after 10:15 p.m. (Tr. 25, 50-51, 30-31), the lighting conditions were evidently fairly good. The street lights were on (Tr. 27, 42), and light was also coming from a furniture store on the corner across the street, approximately fifty feet from the scene of the robbery (Tr. 55-56, 78).

Miss Abney called to the police and directed them toward the fleeing suspects (Tr. 58-60, 72-75). Some time later the police returned with Solomon and Lewis in custody, and Miss Abney identified them at the scene (Tr. 60).

The remaining testimony on behalf of the Government was provided by two police officers and dealt with the arrest of Lewis and Solomon and the recovery of the complainant's wallet and keys, which were found in the park. Significant for the purposes of this appeal is the testimony of Officer Floyd L. Johnson of No. 11 Precinct, who placed appellant Solomon under arrest. Officer Johnson stated that he and his partner responded to a radio run for a robbery in progress at Minnesota Avenue and 22nd Street, S.E. When the officers arrived, they saw three persons running through a nearby park. As his partner parked the scout car, Officer Johnson jumped out and pursued the three fleeing suspects, firing his service revolver twice as he ran. Appellant Solomon, who was one of the three, stopped after the second shot was fired, and Officer Johnson placed him under arrest (Tr. 83-85). The officer brought Solomon back to the place where Mr. Simms was lying on the ground.

> Q. With respect to this Vicky Abney, was there a confrontation with Mr. Solomon and Miss Abney?
>
> A. Yes, she identified them [sic] on the scene. (Tr. 85-86.)

Mr. Simms later identified appellant and Lewis at the precinct— / (Tr. 65, 93-94).

Appellant Solomon testified in his own behalf, stating that he was on his way home alone after having had a few drinks at a friend's house and was walking on 22nd Street when he saw the police. He started to run because he had been drinking and was afraid that the police would arrest him for being drunk (Tr. 143-144). He was unsteady on his feet, "staggering a little," and was unable to run fast (Tr. 140-141, 152). Appellant testified that he did not pass the corner where the robbery took place and denied having taken any part in the robbery (Tr. 144, 154-155).

The case was submitted to the jury on instructions to which which no objection was raised, and in due course the jury returned a verdict of guilty of robbery and not guilty of assault with a dangerous weapon as to Lewis, and guilty of both offenses as to appellant Solomon (Tr. 214).

2/ The officer also testified:

> I brought them [Lewis and Solomon and an unnamed juvenile] back to the scene of the offence and it was about five people there in all and all of them identified these as the ones that assaulted and robbed him. (Tr. 93.)

SUMMARY OF ARGUMENT

In United States v. Wade and Gilbert v. California the Supreme Court extended the protection of the Sixth Amendment to all extrajudicial confrontations for identification purposes. The absence of counsel from a post-Wade confrontation requires the exclusion of all evidence flowing from it. The two exhibitions of appellant to the witnesses in the case at bar, although they took place almost four months after Wade and Gilbert were decided, were conducted in the absence of counsel contrary to the mandates of the Supreme Court. The illegality of these confrontations tainted the subsequent in-court identifications of appellant by these witnesses and necessitated the suppression of their identifying testimony.

Furthermore, the circumstances of the two post-arrest confrontations were so unnecessarily suggestive that appellant was denied due process of law. The fact that all the persons shown to the complainant at the police station were suspects in a robbery committed by multiple participants, together with the condition of the complainant---dazed, injured, and in all likelihood drunk---combined to render the proceedings impermissibly suggestive. The confrontation should have been postponed until

it could have been conducted fairly. As for the identification by Miss Abney at the scene of the crime, the confusion and excitement of the moment and the hasty manner in which the newly arrested suspects were shown to her preclude any finding of compliance with the requirements of due process.

ARGUMENT

The post-arrest identifications of appellant by the two identifying witnesses were procured by the Government in violation of appellant's right to counsel and contrary to due process of law.

(Tr. 24-25, 141-151)

(A) Right to counsel

It is now settled that the right to counsel guaranteed by the Sixth Amendment to the Constitution includes the right of an accused to have counsel present at any pre-trial confrontation held for the purpose of enabling witnesses or victims of a crime to identify him. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967). Under Wade and Gilbert, if a confrontation is held without counsel and a witness identifies the accused, the testimony of that witness at trial identifying the defendant as the perpetrator of the crime must be

excluded unless the prosecution can establish by clear and convincing evidence [6] that the in-court identification has a basis independent of the illegal confrontation. In a companion case, Stovall v. Denno, 388 U.S. 293 (1967), the Court directed that the exclusionary rule established by Wade and Gilbert, although not retroactive, must be applied to all "confrontations for identification purposes" [7] held without counsel after the date of those decisions, which was June 12, 1967. Appellant was arrested and exhibited to the witnesses on October 2, 1967, nearly four months after Wade and Gilbert, in clear violation of the explicit mandate of the Court.

The record contains no mention of the presence of counsel at either confrontation, nor is there anything to indicate that appellant was advised by anyone that he had a right to counsel or that he waived that right. All that the record discloses about Mr. Simms' identification is that it took place at No. 11 Precinct (Tr. 44-47, 55, 61-64), evidently because Mr. Simms "wasn't physically in shape" to identify anyone at the scene [8] (Tr. 39).

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[6] Wade, supra at 24.

[7] Stovall, supra at 296.

[8] Officer Johnson described Mr. Simms' condition as "semi-conscious . . . dazed . . . bleeding from the face and swelled up, eye and face and everything" (Tr. 37). Mr. Simms himself testified that he received treatment for his injuries that same night at Kennedy Hospital (Tr. 54).

At the precinct Mr. Shaw identified both Lewis and Solomon, two of the three suspects with whom he was confronted. At that time, of course, the suspects were in police custody and presumably were under some sort of restraint. Although the record is not as full as one might wish, appellant submits that there is enough evidence to permit this Court to infer that appellant's right to counsel was infringed by the police procedures, and thus to require the Government to demonstrate to the satisfaction of the Court that Mr. Shaw's identification at trial was independently based. Lt. Wade, supra at 14 .

As for the identification by Miss Abney at the scene, it is apparent from the record that this was achieved in the absence of counsel and without proper advice--indeed, without any advice --to appellant of his Sixth Amendment right. The police brought their freshly arrested suspects immediately back to the scene, where they were promptly identified by Miss Abney. Thus the Court is faced with a situation very similar to that in Wise v. United States, 127 U.S. App. D.C. 270, 383 F.2d 211 (1967). The confrontation in Wise took place prior to June 12, 1967, and thus the Court was not obliged to decide, and did not decide, whether Wade establishes a Sixth Amendment right to counsel even at a confrontation at a time and place proximate to the offense." 127 U.S. App. D.C. at 272, 383 F.2d at 213. The instant case, however, is

post-Wade, and appellant submits that Wade and Gilbert allow for no exceptions. The moment the police restrict another person's freedom of movement, that person is under arrest and in custody. Henry v. United States, 361 U.S. 98 (1959); Bailey v. United States, ___ U.S. App. D.C. ___, 389 F.2d 305 (1967). At that moment certain rights inure to the benefit of the arrested person, including the right to counsel, as Miranda[9/] teaches. Wade and Gilbert flow from Miranda, and appellant submits that the right to the presence of counsel at a post-arrest confrontation is as absolute as the right under Miranda to the presence of counsel at a post-arrest interrogation.

(b) Due process

Stovall v. Denno, supra, also reiterated the "recognized" principle that, apart from the Wade-Gilbert rule, a confrontation for identification purposes must not be "so unnecessarily suggestive and conducive to irreparable mistaken identification that [the accused is] denied due process of law." 388 U.S. at 302. This proposition is "independent of any right to counsel claim." Id.; see Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1966). Appellant submits that the circumstances under which he was

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9/ Miranda v. Arizona, 384 U.S. 436 (1966).

presented to Mr. Simms and Miss Abney for identification on the evening of his arrest were such as to amount to a denial of due process.

As to the identification at the precinct by Mr. Simms, the manner in which it was obtained by the police was, in appellant's view, impermissibly suggestive. Although the record is not enlightening on this point, the confrontation conducted by the police might arguably be called a lineup. But whether or not it was an actual lineup, appellant maintains that it is inherently unfair for the police to exhibit a group of suspects to a witness when (1) the offense was committed by several individuals, rather than just one or two, and (2) the police have reason to believe that all the persons in the lineup were involved in the offense. In this case the police arrested three young men at or near the scene of the robbery, took them forthwith to the precinct, and promptly placed them on view. Mr. Simms, having been taken by surprise and knowing only that he was set upon by a large number of youthful assailants, would have been willing and eager to identify almost anyone of the same approximate age and general appearance. It is to his credit that he did in fact fail to identify one of the three persons shown to him, but this does not detract from the basic unfairness of the procedure. In such a situation the odds are calculably against each individual suspect.

...em to this to admit the evidence of Mr. Simms' physical condition--emaciated, tense, probably in considerable pain, and very possibly drunk---due to the unwillingness of the police procedure ...asses the bounds of permissibility. The statements identification could not have been "the product of the witness' objective faculties, and . . . the Government's exploitation of it resulted in a deprivation of due process." Smith v. United States, D.C. Cir. No. 21,203, decided January 31, 1974, slip opinion at 5. The suspects were already in custody and were not going anywhere, nor were there any emergency circumstances such as those relied upon by the Court in Stovall, supra. Any confrontation between appellant and Mr. Simms could have and should have been deferred until it could be held in accordance with the constitutional standards so recently articulated by the Supreme Court.

Miss Abney's identification of appellant at the scene would at first blush appear to come within the scope of this Court's holding in Rice v. United States, supra. On this point the Court stated:

> The presentation of only one suspect, in the custody of the police, raises problems of suggestibility that bring us to the threshold of an issue of fairness. But that is generally the case with confrontations immediately after hot pursuit.

> Here was a confrontation proximate to the scene and time of the offense as well as the apprehension, where the observers and actors were limited to those that were in fact present at the scene and time of the offense and the chase. There were circumstances of fresh identification, elements that did anything promote fairness, by assuring reliability, and are not inherently a denial of fairness. Putting aside the issue of right to counsel for reasons already noted, we do not consider a prompt identification of a suspect close to the time and place of an offense to diverge from the rudiments of fair play that govern the due balance of pertinent interests that suspects be treated fairly while the state pursues its responsibility of apprehending criminals. 127 U.S. App. D.C. at 202-203, 383 F.2d at 240-241.

What would seem to be that, were it not for two facts that cast a shadow on Miss Abney's identification of appellant. First, although Miss Abney was only three to five feet away from Mr. Sims — Sims when he was attacked (Tr. 15), she immediately retreated across the street to the opposite corner and watched what was happening from the safe distance of approximately fifty feet (Tr. 55-51), a distance from which her ability to see and discern anyone's features would have been appreciably lessened. Second, and more significantly, the excitement of the moment was far from conducive to a reliable identification. As Miss Abney testified, passing cars were stopping, and people began to come out on their porches (Tr. 57-58). Officer Johnson told of "the people" who "kept pointing and telling me that the man got robbed here . . ." (Tr. 62). After he and the other officers had arrested their

suspect and brought him back, all of them people--i.e., the five or so who were in the immediate vicinity of the corner where the offense took place (Tr. 71)--identified them as the robbers (although it is worth noting that Mr. Bland later failed to identify the juvenile suspect). It requires the barest modicum of imagination to see the scene in the victim's eye---the commotion, the confusion, the cries of pandemonium, the figures all lying unconscious on the ground. This is a far cry from the scene in Wise, supra. The Wise confrontation took place in a relatively tranquil setting, with no onlookers, no passing traffic, no shots fired, and no one injured. Appellant submits that the Wise case is sufficiently distinguishable on its facts as to make its applicable here. In the normal setting of the case at bar Miss Abney would probably have identified anyone the police brought back and showed to her.[11]/

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[11]/ At the very least the police could have followed a procedure like that which this Court implicitly approved in Calhoun v. United States, No. 74-1111, decided August 2, 1976:

> [t]he police officer who arrested Calhoun, an experienced street detective, kept him out of the victim's sight until he had elicited a description from her. She again said that the "wrongdoer" was both stunned and wore a fishnet shirt. Thereupon, Calhoun was brought before her and she spontaneously and unequivocally identified him as the "wrongdoer" who had raped her.

Calhoun v. United States, supra, slip opinion at 5.

Appellant is admittedly at somewhat of a disadvantage in that the testimony of the identifying witnesses was never challenged in the court below. If this Court feels that the record is inadequate to decide the issues presented here, the Court might consider the possibility of a remand to explore further the matter of identification, as in Wright v. United States, supra, and (Calvin) Smith v. United States, No. 20773, decided June 7, 1951; cf. (Lawrence) Jones v. United States, No. 20801, opinion dated September 3, 1951. Appellant nevertheless feels that the record presently before the Court, although it could be more informative, is sufficient on its face to warrant reversal of his conviction.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be reversed.

JOHN A. TRAY
Counsel for Appellant
(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was personally served at the office of the United States Attorney, United States Court House, Washington, D.C., this 17th day of September, 1962.

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,155

OTIS SOLOMON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

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Cr. No. 1457-67

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ISSUES PRESENTED

In the opinion of appellee, the following issues are presented:

(1) Should the propriety of appellant's post-arrest confrontations with eyewitnesses be considered on appeal where appellant did not raise this question before the trial court?

(2) Did the on-the-scene identification made by an eyewitness violate appellant's rights to counsel or due process?

(3) Did the precinct identification made by the complaining witness shortly after the offense was committed and appellant apprehended violate his rights to counsel or due process?

This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,155

OTIS SOLOMON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On March 25 and 26, 1968, appellant, along with co-defendant John Lewis,[1] was tried by a jury before District Judge Smith on a two-count indictment charging robbery and assault with a dangerous weapon (shod foot). The jury found appellant guilty on both counts. He was sentenced by Judge Smith to from two to six years imprisonment, on each count, with the sentences to run concurrently.

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[1] Co-defendant Lewis was convicted of robbery only and did not appeal.

The evidence presented at trial showed the following:

By his testimony, Willie L. Simms, a self-employed roofer, was walking home from work after 10:00 P.M. along Minnesota Avenue, S.E., on October 9, 1967. Suddenly, in the 2200 block, he was grabbed from behind, spun around, and told to hand over his money. As he turned around, he saw a group of "more than two or three" youths in front of him (Tr. 26)—among whom was appellant. (Tr. 40.) Because he resisted handing over his money, he and appellant commenced fighting (Tr. 33, 45). At that point, he was knocked to the ground and "stomped"—by whom he could not see (Tr. 44-45). Shortly thereafter, he lost consciousness. When he came to, he found several people gathered around him, including the police. (Tr. 43.) He discovered then that his wallet and keys were missing (Tr. 30-31).

On direct examination, Mr. Simms made a courtroom identification of appellant as one of his assailants (Tr. 32). At that time, he also stated that he was taken from the scene of the offense to the Eleventh Precinct (Tr. 31). On cross-examinaion, he testified that he had identified appellant, along with co-defendant Lewis, from among three young men [2] shown him at the Precinct (Tr. 46-47). He was unable to identify the third young man.

By her testimony, Vicky Abney, who lived in the area, was walking along Minnesota Avenue, S.E., on the evening in question, when she saw six teenagers emerge from a park, pass her, and gather about Mr. Simms, who was leaning against a fence [3] (Tr. 52-53, 61-62, 71-72). Among the group was appellant, who approached Mr. Simms and asked him if he had any money. In response to Mr. Simms' mumbled reply, appellant asserted "Oh yes you do!" (Tr.

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[2] The three young men were appellant, co-defendant Lewis, and one Charles Ford. Appellant was 25, Lewis 18, and Ford 17. (Tr. 142, 102, 112).

[3] From his demeanor, Miss Abney concluded that Mr. Simms was intoxicated. (Tr. 52-53) She did not, however, see him take a drink or possess a bottle. (Tr. 62) Mr. Simms testified that he had not been drinking. (Tr. 37-38)

53). Appellant then directed co-defendant Lewis to go through Mr. Simms' pockets—which Lewis did, handing the contents to appellant (Tr. 54, 64-66). Charging that Mr. Simms had more than that, appellant proceeded to strike him. Lewis followed suit. Appellant incited the others to strike Mr. Simms, and they did so—knocking him down. (Tr. 55-57.)

During the roughly two minutes it took for all this to happen, Miss Abney was standing at the curb—about three to five feet away from the action (Tr. 63-64). Lighting conditions were fairly good, with light coming both from street lamps and from the windows of a nearby store (Tr. 27, 42, 77-78). When Mr. Simms was knocked down, Miss Abney crossed the street and continued observing from a distance of about fifty feet (Tr. 56). She saw more than one of the six teenagers kick Mr. Simms, but she was unable to state who did the kicking (Tr. 55, 57).

Miss Abney then went inside a private home and telephoned the police (Tr. 59, 72-75). She awaited the police at the doorstep, and, when the scout car arrived, she indicated the fleeing teenagers (Tr. 59-60, 75). All six had remained, beating Mr. Simms, until the scout car approached. At that point, they took flight, en masse, through the park (Tr. 59-60, 75).

After appellant was apprehended, he was returned to the scene of the offense where, in the company of other witnesses, Miss Abney identified him as one of Mr. Simms' assailants (Tr. 60).

By his testimony, Private Floyd Johnson of the Metropolitan Police Department was in a scout car on October 9, 1967. At 10:27 P.M. he received a radio run for a robbery in the vicinity of Minnesota Avenue and 22nd Street, S.E. (Tr. 80-81.) Upon responding, he saw about five persons, including Vicky Abney, standing on the corner, pointing in the direction of three men running through the park. As his partner pulled the scout car to the curb, Private Johnson jumped out and gave chase to the three fugitives. (Tr. 82, 91.) He pursued them

through the park and part way down 22nd Street. When the fugitives ignored a warning to halt, he fired one shot with his service revolver. (Tr. 84.) Getting no response to his first shot, he fired a second shot. At that point, appellant stopped; he was taken into custody by Private Johnson. (Tr. 85, 92.)

Retracing the path of the chase, Private Johnson located Mr. Simms' wallet and keys, lying in the street (Tr. 82- 88-89, 92-93). At the scene of the crime, Miss Abney identified appellant as one of the perpetrators of the crime (Tr. 93). Because he was semi-conscious and bleeding, Mr. Simms was in no condition to make an identification. Both Mr. Simms and the three fugitives [4] were then taken to the Eleventh Precinct, where the latter were exhibited to the former. Mr. Simms, no longer dazed, identified appellant and co-defendant Lewis as two of the persons who had beaten and robbed him (Tr. 93-94).

Appellant testified that on that October 9th evening he was walking home along Minnesota Avenue, S.E., and had just rounded the 22nd Street corner when he saw the police pull up. He had been at his girlfriend's house, where he had had a couple of drinks (Tr. 143, 145). He said he was unsteady on his feet—staggering a little—and he feared the police would arrest him for being drunk (Tr. 144). Though he was not fleet of foot (Tr. 153), he began running. He stopped after the police officer fired the first shot (Tr. 152).

Appellant denied he had ever struck or robbed Mr. Simms (Tr. 144). He said the first time he saw Mr. Simms was at the Precinct. He also denied he had ever seen anyone else fleeing the policeman. (Tr. 151, 153)

At no time was any objection ever posed to any of the Government's identification evidence.

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[4] Appellant, co-defendant Lewis (who was found under a car at 22nd Street and Q), and Charles Ford.

ARGUMENT

I. Introduction of the curbside and precinct identifications, unobjected to at trial, cannot be challenged for the first time on appeal.

(Tr. 46-47)

The instant case was tried over nine months after the well-publicized Supreme Court decisions in *United States* v. *Wade*, 388 U.S. 218 (1967); *Gilbert* v. *California*, 388 U.S. 263 (1967); and *Stovall* v. *Denno*, 388 U.S. 293 (1967).[5] At no point did appellant's counsel object to either in-court or out-of-court identifications. It must be assumed that counsel made a tactical judgment not to raise the issue. Aware of possible misidentification, as reflected in the knowledgeable cross-examinations on the out-of-court identifications (Tr. 46-47), trial counsel remained mute. Yet appellant now argues in effect that it was prejudicial to permit identifications below, some of which he elicited, in evidence. His argument comes too late.

In *Adams* v. *United States*, D.C. Cir. Nos. 20,547-49, June 21, 1968, n.1, this Court indicated that a due process objection to introductions of identification testimony must be raised in the trial court, where relevant facts can be elicited, before the issue can be considered on appeal.

Persuasive analogy supporting this view as to both in-court and pre-trial out-of-court identifications is found in the many cases holding that constitutionally based objections to introduction of claimed illegally seized evidence are too late if made after the evidence is admitted. *Segurola* v. *United States*, 275 U.S. 106, 110-12 (1927); *Mills* v. *United States*, D.C. Cir. No. 21,246, March 22, 1968 (unreported order); *United States* v. *McDonough*, 265 F. Supp. 368 (W.D. Pa. 1967); *United States* v. *Nirenberg*, 19 F.R.D. 421, 422 (E.D. N.Y. 1956).[6]

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[5] This Court's decision in *Wright* v. *United States*, D.C. Cir. No. 20,153, January 31, 1968, further sensitizing the local bar to the implications of the eight-month-old *Stovall* case, had been announced almost two months before trial.

[6] For an appellate court to consider appellant's objection to introduction of in-court identifications and the curbside and precinct

Analogy is likewise found in the many cases which make it clear that constitutionally based objection to introduction of a statement by accused made in violation of the right of counsel articulated in *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), cannot be made for the first time on appeal. *Ramey* v. *United States*, 118 U.S. App. D.C. 355, 336 F.2d 743, *cert. denied*, 379 U.S. 840 (1964); *Puryear* v. *United States*, 378 F.2d 29 (5th Cir. 1967); *Toland* v. *United States*, 365 F.2d 304 (9th Cir. 1966); *United*

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identifications without an evidentiary hearing into the claimed improprieties would be in discord with the *rationale* and underlying policy factors reflected in Fed. R. Crim. P. 41(e), although admittedly not with its language, which applies only to unlawful searches and seizures. The rule

> . . . provides that the judge before whom the motion [to suppress evidence] is brought shall receive evidence on any issue of fact necessary to decide the motion. In terms of the relative scope of duties of judge and jury, the motion to suppress presents a question of law to be determined by the judge alone. In order to dispose of the issue, however, the judge must often resolve sharply disputed questions of fact. . . .

Moore's FEDERAL PRACTICE ¶ 41:08[4] (Cipes ed. 1965). The original Committee Note to Rule 41(e) stated that,

> This rule is a restatement of existing law and practice . . . the rule provides that such motion may be made only before the [district] court and not, as previously, before either a commissioner or the court. The purpose is to prevent multiplication of proceedings and to bring the matter before the court in the first instance. . . .

Id. at ¶ 41:01[2].

On the general policy requiring constitutional questions to be raised at the earliest possible stage of litigation, see *On Lee* v. *United States*, 343 U.S. 747 n.3 (1952) (". . . where, as in this case, the [general] objection relied on collateral matter to show inadmissibility, and in addition the exclusionary rule to be relied on involves interpretation of the Constitution, the orthodox rule of evidence requiring specification of the objection is buttressed by the uniform policy requiring constitutional questions to be raised at the earliest possible stage in the litigation. . . ."). See also, *Schmerber* v. *California*, 384 U.S. 757 n.9 (1966) (". . . We think general Fifth Amendment principles . . . would be applicable. . . . Since trial was conducted after our decision in *Malloy* v. *Hogan* . . ., making those principles applicable to the states, we think petitioner's contention is foreclosed by his failure to object on this ground to the prosecutor's question and statements.").

States v. *Del Llano*, 354 F.2d 844 (2d Cir. 1965) (*en banc*); *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966).[7] Similarly, appellee suggests, a due process argument that might have been made at trial cannot be raised for the first time on appeal, after opportunity for a full evidentiary hearing has knowingly been allowed to pass, and cannot constitute ground for reversal. To the extent that appellant himself elicited the evidence below he now deems erroneously admitted, we strongly suggest that appellant has waived his right to object on appeal to introduction of the evidence. To the extent that a full hearing was not held as a result of appellant's failure to object or move to strike evidence introduced by the Government, we suggest with equal vigor that appellant is barred from raising such objections now by the plan for orderly, effective administration of justice reflected in Fed. R. Crim. P. 51 requiring a party to "[make] known to the court the action which he desires the court to take on his objection to the action of the court and the grounds therefor." As applied to objections to admission of evidence, this is in order that the opposing party may lay a proper foundation for admission of the

[7] There appear to be a variety of opinions in this Court as to whether claim of impropriety in identification procedures, not raised at a trial occurring before the decision announcing the relevant rule, may be made on appeal. In *Smith (Calvin)* v. *United States*, D.C. Cir. No. 20,773, June 7, 1968, this Court (2-1) remanded a case for further inquiry into claimed impropriety in police procedures at a pre-trial photographic identification of defendant; the case had been tried before *Stovall* and *Simmons* v. *United States*, 390 U.S. 377 (1968). *Wright*, remanding for a *Stovall* hearing, was also tried before *Stovall* and *Wade*, and at a time when the law of this Circuit clearly rejected such claims. *Kennedy* v. *United States*, 121 U.S. App. D.C. 291, 353 F.2d 462 (1965). On the other hand, in *Adams* v. *United States*, D.C. Cir. Nos. 20,547-49, June 21, 1968, also a pre-*Stovall* trial, this Court suggested that a due process claim must be raised in the trial court before the issue could be considered on appeal. And see *Patton* v. *United States*, D.C. Cir. No. 21,161, decided October 29, 1968, slip op. fn. 3. Those cases seeming to allow raising of the question for the first time on appeal are distinguishable, since appellant in instant case was tried long enough after *Wade* and *Stovall* to make the requirement of objection manifestly reasonable.

proffered evidence and thus prevent needless appeals. See, *e.g.*, *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966). Having failed to help the trial court in seeing that the best possible foundation was laid, appellant is foreclosed from questioning that court's action on appeal.

II. The on-the-scene identification made by an eyewitness did not violate appellant's rights to counsel or due process.

1. The right to counsel provided for in *United States* v. *Wade*, 388 U.S. 218 (1967), should not be extended to an eyewitness identification reasonably proximate in time and place to the commission of the offense.[8] Such an extension would substantially reduce opportunity to obtain fresh and accurate eyewitness identification. It would also severely hamper apprehension of the real offender, where the eyewitness at a delayed identification procedure denies that the suspect initially apprehended committed the offense and investigation must be recommenced. In short, such an extension would prove sorely detrimental to effective law enforcement.

The prompt identification procedure followed in this case is both a common and a reasonable police procedure. Since the ability of an eyewitness to identify an offender diminishes as the length of time between the offense and the identification increases, a procedure for prompt identification maximizes accuracy.[9] If the suspect apprehended is in fact the offender, society's interest in the accuracy of the identification is vital. If the suspect apprehended is not the offender, his interest in the accuracy of the identification is vital.

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[8] This issue is presently before this Court in *Bobby Russell* v. *United States*, D.C. Cir. No. 21,571, argued September 17, 1968.

[9] This fact was recognized by this Court in *Wise* v. *United States*, 127 U.S. App. D.C. 279, 281, 383 F.2d 206, 208 (1967), and in *Wright* v. *United States*, D.C. Cir. No. 20,153, decided January 31, 1968, slip opinion at 7 (fn. 26).

In addition, where the police have apprehended a suspect who is not the offender, the extension of the right to counsel to prompt identification procedures would render apprehension of the actual offender exceedingly difficult, if not well-nigh impossible. Where street crimes involving offenders unknown to the witnesses are involved, the available time for apprehension of the offender is generally a few minutes after the commission of the offense.[10] If, after apprehension of a suspect, counsel must be provided before an identification can be made, those critical few minutes will be lost. Where the suspect initially apprehended turns out to be the wrong man, the case will be effectively and unsuccessfully closed.

The general trend of recent Supreme Court decisions has been to permit the police to follow reasonable fresh offense procedures. Fourth Amendment requirements were held sufficiently flexible to encompass reasonable "hot pursuits" in *Warden* v. *Hayden*, 387 U.S. 294 (1967). The showing of photographs to eyewitnesses in a fresh offense situation was held to comport with due process in *Simmons* v. *United States*, 390 U.S. 377 (1968). *Terry* v. *Ohio*, 392 U.S. 1 (1968), authorized the police to stop persons for investigation in limited circumstances on less than probable cause to believe that they are engaged in criminal activities and to "frisk" such persons for weapons on less than probable cause to believe that they are armed. These decisions recognize that constitutional standards must be flexible enough to permit the police to act on the street in a manner compelled by the exigencies of the situation and reasonable under the exigencies of the situation.

The *Wade* decision itself was commenced by a notation that the question before the Court related to a "post-indictment line-up" conducted in the absence of defendant's already "appointed counsel." *United States* v. *Wade*, *supra* at 219. This Court acknowledged the apparent limitations on the *Wade* rule in its decision in *Wise* v. *United States*,

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[10] President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Science and Technology, 7-10 (1967).

supra, 383 F.2d at 209 (fn. 9).[11] And in an earlier case, the Court, in language equally applicable to post-*Wade* situations, announced its reluctance to see the constitutional right to counsel extended to prompt identification procedures. *Kennedy* v. *United States*, 121 U.S. App. D.C. 291, 353 F.2d 462 (1965).

The on-the-scene identification made by the eyewitness in this case—Miss Abney—is a textbook example of an identification reasonably proximate in time and place to the commission of the offense which fulfills the values of freshness and accuracy. Miss Abney observed the robbery of and assault on Mr. Simms and telephoned the police. When the scout car arrived, she, along with others, pointed in the direction of three young men fleeing the scene of the offense through a nearby park. Private Johnson gave chase and apprehended one fugitive—appellant. At that point, although there was probable cause to arrest appellant, he could scarcely be said to be conclusively tied to the offense. Chances for a speedy line-up with counsel under the circumstances[12] were non-existent. Has Miss Abney stated that appellant was not one of Mr. Simms' assailants, Private Johnson could have returned immediately to the park—with some hope of locating the real assailants. Appellant could have gone on about his business.

For these reasons, we strongly urge that Sixth Amendment protections as articulated in *Wade* do not accrue to an identification reasonably proximate in time and place to the commission of the offense.[13]

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[11] The Supreme Judicial Court of Massachusetts, which is the only Court known to have faced the question, denied the applicability of *Wade* to prompt identification procedures. *Commonwealth* v. *Bumpus*, 3 Crim. L. Rptr. 3207 (June 14, 1968).

[12] For example, the time was between 10:30 and 11:00 P.M.

[13] Because appellant failed to contest the identifications at trial, the record does not indicate what the circumstances surrounding the identifications were. Was counsel present? Did appellant waive his right to counsel? The record does not indicate. In the event *Wade* is applicable to these circumstances and appellant is allowed to press the issue for the first time on appeal, we think appropriate resolution of that issue requires a remand hearing.

2. Absent special circumstances indicating unfairness, due process of law is not violated by identifications reasonably proximate in time and place to the commission of the offense. *Wise* v. *United States, supra.*

Appellant seeks to distinguish *Wise* on a factual basis. He calls attention to two facts: first, that Miss Abney, having viewed a portion of the offense from a distance of three to five feet, then retreated across the street; and second, that the identification made by Miss Abney occurred under circumstances of some excitement. The relevance of the first fact is unclear. Miss Abney observed the commission of the offense from a distance of three to five feet for two minutes under fairly good lighting conditions. Given that kind of observation, her later retreat across the street seems rather beside the point. As for the second fact: if Miss Abney was excited by the circumstances of this case, imagine the state of mind of Mrs. Ross in the *Wise* case. She had just found a burglar in her own home.

There is no significant difference between this case and *Wise*. Everything this Court said about the identification made by Mrs. Ross in *Wise* can be repeated about the identification made by Miss Abney here.

> Here was a confrontation proximate to the scene and time of the offense as well as the apprehension, where the observers and actors were limited to those that were in fact present at the scene and time of the offense and the chase. Here were circumstances of fresh identification, elements that if anything promote fairness, by assuring reliability, and are not inherently a denial of fairness. Putting aside the issue of right to counsel . . . , we do not consider a prompt identification of a suspect close to the time and place of an offense to diverge from the rudiments of fair play that govern the due balance of pertinent interests that suspects be treated fairly while the state pursues its responsibility of apprehending criminals.

Wise v. *United States, supra,* 383 F.2d at 209-210.

The only unfairness apparent in the identification made by Miss Abney lies in the unfairness inherent in a one-man

show-up. This Court, however, has ruled that the interest in prompt and accurate identifications outweighs appellant's due process interest in a fairer identification procedure. Since no further showing of unfairness has been made,[14] there is no occasion here for either reversal or remand.

III. The precinct identification made by the complaining witness did not violate appellant's rights to counsel or due process.

(Tr. 46-47)

Appellant also objects to the admission of evidence of the precinct identification of Willie L. Simms. Mr. Simms gave such testimony below only at trial counsel's behest during cross-examination (Tr. 46-47), refraining from testifying about that identification during direct examination by the Government. We reiterate our argument earlier made (*supra* at) that appellant by his conduct below is now totally foreclosed from challenging on appeal evidence he himself introduced at trial. We know of no rule of criminal procedure which allows such patently inconsistent conduct.

1. In any event, we think his objection meritless. By the beating he sustained, Mr. Simms was dazed and incoherent at the scene of the offense. Medical assistance was rendered, and as soon as Mr. Simms regained consciousness —shortly after arriving at the police station—he then identified appellant as one of his assailants. Despite appellant's failure to seek a full record to support the testimony he adduced, we think the record clear nonetheless that Mr. Simms identified appellant as soon after the offense as he was able to do so in an environment as proximate to the time and place of the offense as was humanly possible.

For reasons earlier stated (*supra*), we think such identification procedures are reasonable investigative tools

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[14] Compare this case with *Wright* v. *United States*, *supra* at fn. 8, in which appellant was able to show unusual circumstances indicating the possibility of special unfairness.

which promote fresh and accurate identifications and redound to the benefit of the accused as well as law enforcement officials.[15] Accordingly and in light of the tack taken by appellant at trial, we think he suffered no deprivation of any sixth Amendment rights.[16]

2. With respect to the due process question, the Court must make this inquiry: was the identification procedure followed at the precinct "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification"? *Simmons* v. *United States*, *supra* at 313.[17] The standard appellant must meet is thus a high one. The procedure must not only have been "suggestive"; it must have been so impermissibly suggestive as to give rise to "a very substantial likelihood" of misidentification. Moreover, the misidentification must have been "irreparable."

The precinct identification made by Mr. Simms by no means measures up to such a standard. If the identification had occurred a few minutes earlier at the scene of the offense, it would have fallen within the mandate of the *Wise* decision, *supra*. But the only reason it was moved to the precinct was because Mr. Simms was too battered and bruised to make an identification on the scene. It would be ironic if the move, the purpose of which was to provide Mr. Simms with medical attention, rendered the

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[15] Notwithstanding Miss Abney's on-the-scene identification, Mr. Simms' identification at this juncture was important to the decision of whether to book appellant for the offense or release him and recommence investigation.

[16] Again we urge the Court that if it be held that *Wade* protections accrued to appellant in the circumstances of Mr. Simms' identification, the case be remanded for a factual hearing to determine if indeed counsel was present, if not, if appellant otherwise waived this right.

[17] The *Simmons* standard is used here, rather than the *Stovall* standard, because the Court opinion in *Simmons* represented the thinking of a majority of the Court—whereas the Court opinion in *Stovall* did not. In *Stovall*, only Justice Clark and Chief Justice Warren joined the opinion of Justice Brennan, which, for want of an opinion with greater support, became the opinion of the Court.

identification he was able to make because of it a violation of due process.

Moreover, the identification procedure used was not a one-man show-up, which raised the prejudice possibility explored in *Wise*. Mr. Simms was shown three young men. He picked out appellant and his co-defendant as participants in the attack on him. However, he could not and did not identify the third young man as one of his attackers.

In determining whether there is a "very substantial likelihood" of misidentification in this case, these factors weigh heavily. Moreover, we note the following additional relevant considerations:

1. At trial, Mr. Simms exhibited no doubt about the correctness of his identification of appellant.[18] He had seen appellant at close quarters under fairly good lighting conditions at the time the offense was committed. He testified that he had struggled with appellant face to face. The struggle, by Miss Abney's estimate, lasted about two minutes.

2. The trial also included the positive identification made by Miss Abney, who had observed the commission of the offense from a very short distance.[19] It included evidence of the flight of appellant from the scene of the offense, requiring the firing of two shots before he was willing to stop. Finally, it included evidence of the finding of the stolen property along the path appellant had taken as he fled the scene of the offense.

3. We reiterate that appellant himself introduced the subject of the Precinct identification at trial. Appellee was content to rest on the courtroom identification made by Mr. Simms. The subject of the precinct identification

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[18] Note that the Supreme Court in *Simmons*, in making the same determination, considered both the unshakability of the identifications at trial, as well as the witnesses' opportunity to observe during the commission of the offense. See *Simmons* v. *United States*, *supra*, 88 S.Ct. at 972.

[19] *Simmons* v. *United States*, *supra*.

came up on cross-examination of Mr. Simms. *Cf. Gilbert* v. *California*, 388 U.S. 263 (1967).[20]

Under all of these circumstances, we think it clear that the precinct identification made by Mr. Simms was not so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. His opportunity to observe; the freshness of his identification; the use of three participants in the identification procedure; the refusal of Mr. Simms to positively identify a participant he could not recall; the quality and quantity of corroborating evidence—all of these factors import to Mr. Simms' identification of appellant a distinctively high degree of accuracy.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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[20] Finally, if Miss Abney's on-the-scene identification was properly admissible (discussion, *supra*), we think any prejudice suffered by admission of Mr. Simms' precinct identification was of an order insufficient to predicate reversal. See *Alexander Patton* v. *United States*, *supra*, slip op. fn.3 at pps. 4-5.

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